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No. 80-1831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

ROBERT L. DAVIS, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a school desegregation action, the courts below abused their equitable discretion by (a) ordering further relief for faculty and staff recruitment and assignment when they found that relevant provisions of a desegregation plan in fact had not been implemented, and (b) ordering that transportation be provided when they found that the student assignment plan imposed undue transportational burdens on certain black students.

2. Whether a school desegregation action is moot where the courts below permitted black school children and parents to intervene and be substituted for named parties plaintiff who no longer attend schools in the defendant school district.

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On Petition For a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

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BRIEF IN OPPOSITION

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Statement

This action to desegregate the public school system in North Little Rock, Arkansas, was filed by black students

and parents in August 1968.[1] A desegregation plan which extended to, inter alia, student assignment, and faculty and staff

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1/ The action was brought by Cornell Graves, et al., as a class action pursuant to Rule 23(a) and (b)(2), Fed. R. Civ. Pro. (Complaint). Upon the graduation of original plaintiffs, the Eighth Circuit permitted Robert J. Davis, et al., to intervene as parties plaintiff in order to represent themselves and members of the putative class, and to be substituted for original plaintiffs. Order of February 2, 1971, Davis v. Board of Education of North Little Rock, 8th Cir. No. 20486. On April 22, 1977, the district court permitted substitution of Lorene Joshua, as mother and next friend of her four children, all North Little Rock students, as parties plaintiff in order to represent themselves and members of the potential class after Robert J. Davis, et al., moved from North Little Rock (see, A-15). The same day, the court denied a motion to dismiss for mootness (id.).

The courts below have treated the action as a class action (see, e.g., A-2, A-14), but a class action has never been formally certified.

assignment was ordered implemented in school year 1972-1973. Davis v. Board of Education of North Little Rock, 449 F.2d 500 (8th Cir. 1971) (en banc). The district court retained jurisdiction to oversee implementation of the plan (449 F.2d at 502, A-14).

On April 30, 1975, plaintiffs filed a motion for further relief. A contempt citation was also sought against defendants and their counsel for failure to comply with the 1971 mandate of the Eighth Circuit. A three-day hearing was held on the 1975 motion in April 1977, and the district court issued a memorandum opinion on September 13, 1977 (A-14).

As to faculty and staff, the court ordered the implementation of objective nondiscriminatory recruitment and assign-

ment (A-19 - A-23). In 1969, the district court had rejected a faculty and staff desegregation plan consisting solely of a nondiscriminatory pledge, but failed to order the development of objective standards (id.). In 1971, the Eighth Circuit directed the district court to require the school district to establish and implement such standards. However, the mandate was not enforced until 1977, and the school district continued to use the policies rejected in 1969. The court found faculty and staff policies to be highly subjective and discriminatory, and ordered the development of objective nondiscriminatory standards.[2/]

2/ The court of appeals found that:

> We believe that Judge Shell's findings are more than adequately

With respect to pupil transportation, the motion for further relief sought to reduce the burden of travel on secondary students living in the predominantly black Dixie Addition in the city's southeast section (A-16 - A-18). All black secondary students had attended Jones High School located in the Dixie Addition before desegregation. Under the student assignment portion of the desegregation plan, Jones was converted to a district-wide seventh grade center and black students reassigned to other schools,

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2/ Continued

supported by the record and that his order is an appropriate one which hopefully will ensure a nonracially identifiable faculty and staff at every level of the school system.

(A-6 - A-7).

including Northeast High School and Lakewood Junior High, which share a campus in the extreme northeast section (id.). The court found that "there is no reasonably safe pedestrian pathway from the Dixie Addition area to Northeast High School and Lakewood Junior High," that students living in the Addition assigned to northeast schools do not have access to transportation, and that the desegregation plan "imposes an undue transportational burden upon those black students" (A-18-A-19). The court also found that white secondary students were not subject to such transportational burdens (id.). Plaintiffs requested that either Jones High School be reopened for upper grades or that transportation be provided for students assigned to Northeast and Lake-

wood Junior High living in the Dixie Addition. The court ordered the latter.[3/]

3/ The Court of Appeals found that:

> The record fully supports the district court's findings and conclusions. There is abundant testimony in the record indicating that students living in the Dixie Addition are required to cross a major interstate highway at the busiest time of day to reach North East High School; that there is no safe and convenient way to cross that highway; that students are required to walk on the streets through much of the route between "Dixie" and the high school -- a distance of about two miles. The record also reveals that many of the families that live in the Dixie Addition are low income families who are unable to afford the cost of public transportation to and from school; it further reflects the fact that public transportation is not always convenient or dependable. We also note that the district court was concerned with equalizing the burden of integration as between the black and white students in the school district, and believed that providing transportation to the predominantly black Dixie high school students was one way of

The court pretermitted decision on plaintiffs' assertions that the school district discriminated against black students in assignment to special education and honors classes, imposition of discipline, and participation in extracurricular activities.[4/] The court also

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3/ Continued

> accomplishing this goal. We agree that the goal is a legitimate one and that it will be achieved in part by the district court's order.

(A-4).

4/ The court found that disparities "did not rise to the level of showing systematic discrimination," that "regrettable incidents stemming from racial prejudice" were not within the scope of the lawsuit, and that, "[a]t any rate, some of the matters about which plaintiffs complain have been resolved or are in the process of resolution" (A-24).

The court of appeals found:

> We ... note that the record is replete with evidence that black

"decided that nothing can be served by holding the defendants and defense counsel in contempt" for failing to enforce provisions of the desegregation plan and Eighth Circuit mandate (A-26). Attorney's fees also were awarded (id.).

4/ Continued

students do not participate in proportion to their numbers in certain extracurricular activities including cheerleading, pep club, band, drill team and future homemakers. The record also shows that black students are suspended more frequently than white students and that they tend to be numerically overrepresented in the special education classes for slow learners.

There is a serious dispute in the record regarding the reasons for lack of participation in the listed extracurricular activities, for the more frequent suspensions and overrepresentation in the classes for slow learners. The plaintiffs introduced evidence tending to show that the school district and its administrators were responsible, and that these conditions resulted because of the discriminatory

The school district moved to alter and amend and for a new trial, but the motions were not immediately acted upon because the district judge died. Eventually, the motions were denied June 29, 1979 (A-27).

4/ Continued

> policies of the Board, the school administrators and the faculty. The Board introduced evidence tending to show that nonracial factors were responsible for the conditions. Judge Shell did not explicitly decide these issues. ... While we are not prepared to hold at this time that the district court's rulings in these regards are clearly erroneous or based on an erroneous view of the law, we are satisfied from the record that the situation can be dramatically improved if this Court's earlier mandate, requiring a non racially identifiable faculty and staff at <u>every level</u> of the school system, is promptly implemented. Judge Shell's order, which we affirm today, imposes that requirement on the Board of Education.

(A-7).

On appeal, the Eighth Circuit affirmed without dissent (A-1).

REASONS FOR DENYING THE WRIT

The opinions below raise no important question requiring review, and are consistent with opinions of this Court and the courts of appeals.

1. The North Little Rock school district has never been declared to be a unitary system. No court has taken evidence and determined that the desegregation plan ordered into effect in the 1972-73 school year has worked "'to effectuate a transition to a racially nondiscriminatory school system.'" Columbus Board of Education v. Penick, 443 U.S 449, 458 (1979), quoting Brown v. Board of Education, 349 U.S. 294, 301 (1955). Indeed, five judges below found that, under the desegregation plan as

implemented, faculty and staff were discriminatorily hired and assigned, and black students were subjected to disproportionate transportational burdens. Nor is it disputed that the school district failed to comply with specific court orders requiring objective nondiscriminatory selection and assignment of faculty and staff, prior approval of school construction and regular reporting implementation. Faculty and staff integration, e.g., Columbus Board of Education v. Penick, supra, 443 U.S at 460; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971); United States v. Montgomery County Board of Education, 395 U.S. 225 (1969), and transportational burdens, e.g., Swann, supra, 402 U.S. at 26-27, 30-31; Keyes v. School District No 1, 413 U.S. 189, 241 (1973) (Powell, J., concurring and dissenting in part),

are recognized critical components of an effective desegregation plan. The record, in short, demonstrates that significant elements of the remedy were not implemented.

Plainly, the courts below were well within the "breadth and flexibility ... inherent in equitable remedies," Swann, supra, 402 U.S at 15, in "consider[ing] problems related to administration, ... the school transportation system [and] personnel," Brown, supra, 349 U.S. at 300. Indeed, it was their duty. Green v. County School Board, 391 U.S. 430, 439 (1968).5/

5/ Nor are the opinions below contrary to this Court's opinion in Pasadena City Board of Education v. Spangler, 427 U.S 424 (1976), in which the student assignment part of a desegregation plan had been complied with, prior unconstitutional assignment practices cured, and racial

2. Nor did the lower court abuse its discretion in granting the motion of black students and parent to intervene or to be substituted as parties plaintiff

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concentrations resulted from intervening demographic changes. No such findings were made about any facet of the 1972-73 plan. Indeed, this is a case in which the operative facts in Spangler are precisely contrary: provisions of a plan were not implemented. Nor is there any purported split between the Fifth Circuit and other circuits concerning achievement of unitary status. See, Petition pp. 8-9. The law in the Fifth Circuit, as in the other circuits, is that "[t]he critical issue ... is whether a unitary system has been achieved at any time subsequent to the imposition of the desegregation order," United States v. Board of Education of Valdosta, Georgia, 576 F.2d 37, 38 (5th Cir.), cert. denied, 439 U.S. 1007 (1978), not some arbitrary period of time following an order. Whether a school district is unitary is a determination properly made on a case-by-case basis. See, e.g., Martin v. Charlotte-Mecklenburg Board of Education, 475 F. Supp. 1318 (W.D. N.C. 1979), aff'd on other grounds, 626 F.2d 1165 (4th Cir. 1980), cert. denied, 49 U.S.L.W. 3743 (1981).

and representatives of the putative class. See, Rogers v. Paul, 382 U.S. 198, 199 (1968). Plaintiff students' standing to challenge undue transportational burdens resulting from an assignment plan is unquestioned, and their standing to challenge such practices as faculty and staff assignment has long been settled. Rogers v. Paul, supra, 382 U.S at 200.

Unlike Spangler, supra, 427 U.S. at 430, there are named parties with a present interest in the controversy: the issue is not mootness, but whether the requirements of Rule 23, Fed. R. Civ. Pro., are met. The proper forum to test whether plaintiffs are able to prosecute the action as a class action is the trial

court not an appellate court.[6/]

Furthermore, the claims asserted are not somehow stale. The North Little Rock school district "has been under a continuous constitutional obligation to disestablish its dual school system." Penick, supra, 443 U.S at 458. Petitioners' failure to do so is a continuing violation of law.

3. The district court's order that transportation should be provided by the district to students living in Dixie Addition assigned to northeast sector secondary schols is correct. The order was concurred in by another judge on reconsideration and by three other judges on appeal. The order is well within the remedial equitable discretion of the

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6/ Upon issuance of the mandate, plaintiffs intend to move immediately for class certification in the district court.

courts, and the underlying factual findings are well supported and not clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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